IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALLS CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:12-cv-01513-ABJ
	)	
BARACK H. OBAMA, in his official capacity as President of the United States, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Under Section 721 of the Defense Production Act, 50 U.S.C. App. § 2170, the President has the authority to take such action as he considers appropriate to protect the national security by suspending or prohibiting an acquisition of a United States business by a foreign person, where he finds that that acquisition presents a threat to the national security. In affording this authority to the President, Congress specified that his findings and actions shall not be subject to judicial review. 50 U.S.C. App. § 2170(e) ("The actions of the President under paragraph (1) of subsection (d) of this section and the findings of the President under paragraph (4) of subsection (d) of this section shall not be subject to judicial review."). The President exercised this authority by issuing a Presidential Order to prohibit Ralls Corporation, an entity wholly-owned by two Chinese citizens, from acquiring four Oregon companies organized to develop windfarms on property in the vicinity of a military installation. Because the President exercised both powers expressly granted to him by Congress and his own powers -- specifically, his power to address threats presented by foreign persons that might impair the national security -- his action is "'supported by the strongest of presumptions and the widest latitude of judicial interpretation,

and the burden of persuasion [rests] heavily upon any who might attack it.'" *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Ralls now brings this suit, challenging both the Presidential Order and a prior interim order issued by the Committee on Foreign Investment in the United States ("CFIUS" or "Committee"). In light of the plain language of Section 2170(e), this Court lacks jurisdiction over Ralls's complaint. The provision expressly precludes Ralls's challenge to the findings and actions of the President in issuing his Order. Congress forbade judicial review of claims such as those presented by Ralls here for good reason: if such a claim could proceed, the court would be entangled in a review of the President's exercise of his executive powers in the area of national security, a field in which the executive holds special competence. Congress intended that it, and not the judiciary, would serve as the check on the President's actions under the Defense Production Act.

Ralls seeks to avoid the bar on judicial review by asserting that the Presidential Order is ultra vires or unconstitutional. Its effort does not suffice to overcome Congress's expressly stated intent to insulate Presidential decisions from judicial challenges, particularly the sort of insubstantial challenges that Ralls raises here. Neither the President's findings nor his actions in the Presidential Order fall outside his extremely broad discretion, and Ralls's constitutional claims are nothing more than disguised challenges to his exercise of that discretion.

Moreover, Ralls's challenge to the interim CFIUS order is moot; the President has revoked that order, and Ralls cannot show that its claim as to the CFIUS order is capable of repetition yet evading review. The complaint thus should be dismissed for lack of jurisdiction.

Background

I. Legal Background

A. Presidential Authority under the Defense Production Act

Section 721 of the Defense Production Act of 1950 ("Act"), as amended, provides the President with authority to "take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States." 50 U.S.C. App. § 2170(d)(1). For the purpose of this provision (also known as "Exon-Florio," after the legislative sponsors of the bill leading to its enactment), a "covered transaction" is "any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States." 50 U.S.C. App. § 2170(a)(3).

The Defense Production Act designates CFIUS, a committee consisting of the heads of federal agencies with national security responsibilities, to assist the President in his exercise of this authority.[1] The Act accordingly contemplates that the parties to a covered transaction may submit a written notice of the transaction to CFIUS. 50 U.S.C. App. § 2170(b)(1)(C). Upon the acceptance of the written notice by the chairperson of CFIUS, the President, acting through

[1] CFIUS is a multi-agency committee that is assigned with the responsibility "to carry out" the Act and to perform "such other assignments as the President may designate." 50 U.S.C. App. § 2170(k)(1). By statute, the Committee consists of the Secretary of the Treasury; the Secretary of Homeland Security; the Secretary of Commerce; the Secretary of Defense; the Secretary of State; the Attorney General; and the Secretary of Energy. 50 U.S.C. App. § 2170(k)(2). The Secretary of Labor and the Director of National Intelligence also participate in CFIUS on a non-voting, *ex officio* basis. *Id.* The President has the power to appoint additional officials to CFIUS as he determines appropriate. *Id.* Under this authority, the President has appointed the United States Trade Representative and the Director of the Office of Science and Technology Policy to the Committee, and has also appointed several White House officers to participate as observers. *See* Exec. Order No. 13456, § 3(b), 73 Fed. Reg. 4677 (Jan. 23, 2008). The Secretary of the Treasury serves as the chairperson of CFIUS. 50 U.S.C. App. § 2170(k)(3).

the Committee, conducts a review of the transaction to determine the effects of the transaction on the national security. 50 U.S.C. App. § 2170(b)(1)(A). CFIUS has a 30-day period in which to conduct this review, and to assess whether or not further investigation of the transaction is warranted. 50 U.S.C. App. § 2170(b)(1)(E).

Upon completing its review of the transaction, CFIUS may determine that a further investigation is appropriate. In particular, except in limited circumstances, the Act requires a further investigation if the lead agency recommends that an investigation be undertaken (and CFIUS concurs), or the initial review of the transaction results in a finding that:

> (I) the transaction threatens to impair the national security of the United States and that threat has not been mitigated during or prior to the review of a covered transaction under paragraph (1);
> (II) the transaction is a foreign government-controlled transaction; or
> (III) the transaction would result in control of any critical infrastructure of or within the United States by or on behalf of any foreign person, if the Committee determines that the transaction could impair national security, and that such impairment to national security has not been mitigated by assurances provided or renewed with the approval of the Committee, as described in subsection (*l*) of this section, during the review period under paragraph (1)[.]

50 U.S.C. App. § 2170(b)(2)(B)(i), (ii). In such a circumstance, the Act directs that CFIUS "shall immediately conduct an investigation of the effects of a covered transaction on the national security of the United States, and take any necessary actions in connection with the transaction to protect the national security of the United States." 50 U.S.C. App. § 2170(b)(2)(A). Any such investigation shall be completed before the end of the 45-day period beginning on the date on which the investigation commenced. 50 U.S.C. App. § 2170(b)(2)(C).

At the completion of its investigation, in certain circumstances, CFIUS reports to the President and presents him with a recommendation. 31 C.F.R. § 800.506. As noted, the Act

affords the President broad authority to "take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States." 50 U.S.C. App. § 2170(d)(1). The Act authorizes the President to exercise this authority only if he finds that:

> (A) there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security; and
> (B) provisions of law, other than this section and the International Emergency Economic Powers Act, do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security in the matter before the President.

50 U.S.C. App. § 2170(d)(4). The Act provides that the President shall consider particular factors, "as appropriate," in making this determination, "taking into account the requirements of national security." 50 U.S.C. App. § 2170(d)(5), (f). The Act also provides that the President "shall announce the decision on whether or not to take action pursuant to paragraph (1) not later than 15 days after the date on which an investigation described in [50 U.S.C. App. § 2170(b)] is completed." 50 U.S.C. App. § 2170(d)(2). The "actions of the President" and the "findings of the President" under the Act are not subject to judicial review. 50 U.S.C. App. § 2170(e).

The parties to a transaction are not generally required to notify CFIUS of covered transactions. The Act, however, provides powerful incentives for companies to do so. Specifically, a filing with CFIUS provides parties to a transaction with an opportunity to obtain a "safe harbor" from potential divestiture actions brought under the Act. That is, once parties to a transaction notify CFIUS and the CFIUS process has run its course, the parties know that, if the President or CFIUS did not exercise their respective powers under the Act with regard to that transaction, they will not be able to do so in the future (absent a material misrepresentation or

omission on the part of the parties, *see* 50 U.S.C. App. § 2170(b)(1)(D)(ii), or other limited circumstances). The regulations make this explicit, stating that the authority available to the President or to CFIUS "shall not be exercised if" CFIUS has previously concluded all action with respect to a covered transaction or if the President has previously decided not to exercise his authority with respect to a notified transaction. 31 C.F.R. § 800.601(a).

This safe harbor is of particular importance to the parties to the transaction because, if they do not voluntarily file with CFIUS, any CFIUS member or his designee may file an "agency" notice with CFIUS and thereby initiate a CFIUS review process, *even if the transaction has already been completed*. 50 U.S.C. App. § 2170(b)(1)(D); 31 C.F.R. § 800.401(c). If that review results in a Presidential order suspending or prohibiting the transaction, the parties would then bear the consequences of their choice to proceed before gaining clearance through the CFIUS process. *See* 50 U.S.C. App. § 2170(d)(3) (authorizing divestment relief). As a Treasury official has explained the process, parties to covered transactions that raise national security considerations would be wise to file a notice voluntarily with CFIUS:

> [H]aving sat on boards of directors both at home and abroad, I cannot imagine in the post-Sarbanes-Oxley world . . . how any director could give the go-ahead on a transaction [that had not been filed], because the President's authority to unwind that transaction is without limit if the person has not received approval of the process. . . . [T]hat very powerful nonjudicially reviewable authority of the President to stop or unwind transactions acts as a real leavener on the process[.]

A Review of the CFIUS Process of Implementing the Exon-Florio Amendment: Hrgs. Before the S. Comm. on Banking, Housing, and Urban Affairs, 109th Cong. 114 (2005) (testimony of Robert M. Kimmitt, Deputy Secretary, U.S. Dep't of Treasury) ("*Review of the CFIUS Process*").

B. The Committee's Mitigation Authority

Congress also afforded CFIUS the authority to address risks to the national security, including the authority to address those threats presented by a covered transaction that require action to be taken, even before the process described above of notice, review, investigation, report, and Presidential action has been completed. The Act describes this grant of authority to CFIUS in broad terms:

> (A) The Committee or a lead agency may, on behalf of the Committee, negotiate, enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security of the United States that arises as a result of the covered transaction.
> (B) Any agreement entered into or condition imposed under subparagraph (A) shall be based on a risk-based analysis, conducted by the Committee, of the threat to national security of the covered transaction.

50 U.S.C. App. § 2170(*l*)(1).[2] The Act authorizes CFIUS to negotiate agreements with the parties to a covered transaction to address any threat to national security arising from the transaction, or to act on its own initiative to impose an order addressing such a threat, relying on the "expertise" and "knowledge" of the Committee and its member agencies. *See* 50 U.S.C. App. § 2170(*l*)(3)(A) ("The lead agency shall negotiate, modify, monitor, and enforce, on behalf of the Committee, any agreement entered into or condition imposed under paragraph (1) with respect to a covered transaction, based on the expertise with and knowledge of the issues related to such transaction on the part of the designated department or agency.")

[2] A "lead agency" is a member of the Committee that is designated, as appropriate, by the Secretary of the Treasury to have lead responsibility with respect to a particular covered transaction to negotiate mitigation agreements or other conditions necessary to protect national security; to monitor the completed transaction; and to ensure compliance with any agreements entered into or conditions imposed under the Act. 50 U.S.C. App. § 2170(k)(5).

II. Factual Background

Ralls is a Delaware corporation that is privately owned by two Chinese nationals, Dawei Duan and Jialiang Wu. (Am. Compl, ¶ 14 (ECF 20).) Mr. Duan is the chief financial officer of the Sany Group ("Sany"), a Chinese global manufacturing company. (*Id.*) Mr. Wu is a Vice President of Sany and also the General Manager of Sany Electric Company, Ltd. ("Sany Electric"), a wholly-owned Chinese subsidiary of Sany. (*Id.*)

Before March 2012, Terna Energy USA Holding Corporation ("Terna") owned four limited liability companies (the "Project Companies") that had been organized to operate windfarm projects at particular locations in Oregon. (Am. Compl., ¶¶ 59-60.)[3] The Project Companies held land rights for the construction of windfarms at those locations, as well as government permits, power purchase agreements, and other agreements necessary for the construction of commercial windfarms. (Am. Compl., ¶ 61.)

In March 2012, Terna sold the Project Companies to Intelligent Wind Energy, LLC ("IWE"), a Delaware company that was owned by U.S. Innovative Renewable Energy, LLC ("USIRE"). (Am. Compl., ¶ 60.) USIRE then sold IWE to Ralls. (*Id.*)

The windfarm projects are located in or adjacent to a Navy military installation. (Declaration of Marisa Lago, ¶3 (ECF 11-1).) After it purchased the Project Companies, Ralls prepared to begin construction of windfarms at those locations; its construction plans contemplated that it would install wind turbine generators that had been constructed in China by Sany Electric. (*Id.*)

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[3] The Projects Companies are Pine City Windfarm, LLC; Mule Hollow Windfarm, LLC; High Plateau Windfarm, LLC; and Lower Ridge Windfarm, LLC. (Am. Compl., ¶¶ 35-36.) These Project Companies are Oregon limited liability companies. (Am. Compl., ¶ 35.)

The parties did not initially provide notice of the transaction to CFIUS. (Lago Decl., ¶ 4.) Instead, the Committee learned of the transaction only after it had closed. (*Id.*) In June 2012, staff members of CFIUS telephoned representatives of Ralls and invited Ralls to file a voluntary notice of the transaction under 50 U.S.C. App. § 2170(b)(1). (*Id.*, ¶ 5.) During that telephone call, Deputy Assistant Secretary Mark Jaskowiak informed Ralls's representatives that the Committee had determined that the transaction could present national security considerations that warranted CFIUS review, and he advised Ralls to postpone construction until after the Committee could complete its review upon receiving Ralls's forthcoming notice. (*Id.*, ¶ 6.) At that time, Deputy Assistant Secretary Jaskowiak further advised Ralls's representatives that, if it continued construction, Ralls would assume the risk of any costs due to any subsequent adverse CFIUS determination. (*Id.*) Ralls agreed to submit a voluntary notice to the Committee. (*Id.*, ¶ 7.) However, Ralls declined to heed the Committee's request that it postpone construction of the windfarms. (*Id.*) Ralls's representatives acknowledged that, by doing so, the company was assuming the risk of their decision. (*Id.*)

CFIUS accepted Ralls's notice on June 28, 2012. (Lago Decl., ¶ 8.) CFIUS conducted an initial review of the notice under 50 U.S.C. App. § 2170(b)(1), and determined that further investigation should be conducted under 50 U.S.C. App. § 2170(b)(2). (*Id.*, ¶ 12.)

During this process, CFIUS exercised its mitigation authority to address the threat to national security arising from the transaction, more specifically from Ralls's continued construction of the Sany wind turbine projects. Accordingly, on July 25, 2012, CFIUS issued an Order Establishing Interim Mitigation Measures ("Interim Order") to Ralls. (Lago Decl., Ex. A.) The Interim Order directed Ralls to cease all construction and operations at the

locations of the windfarm projects; to have United States citizens approved by CFIUS remove any stockpiled or stored items at those locations; and otherwise to cease all access to those locations. (*Id.*, § 1.) On August 2, 2012, CFIUS issued an Amended Order Establishing Interim Mitigation Measures ("Amended Interim Order"), which reiterated the Interim Order's directives, and which also instructed Ralls not to transfer any items produced by Sany for use at the locations of the windfarm projects, and not to transfer the Project Companies without first giving CFIUS the opportunity to object to the proposed transferee and without first removing any affixed items at those locations. (Lago Decl., Ex. B.) Both mitigation orders recited that they would remain in effect only until CFIUS concluded action, or until the President took action under 50 U.S.C. App. § 2170. (Lago Decl., Ex. A, § 5; Ex. B, § 6.)

The President issued an order on September 28, 2012, addressing the threat to national security that he found to have arisen from Ralls's acquisition of the Project Companies. Order of September 28, 2012 Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281 (Oct. 3, 2012) ("Presidential Order"). The President found that "[t]here is credible evidence that leads [him] to believe that Ralls Corporation," as well as, among others, Sany, Sany Electric, Mr. Duan, and Mr. Wu, "through exercising control of [the Project Companies] might take action that threatens to impair the national security of the United States." Presidential Order, § 1, 77 Fed. Reg. at 60,281. The President accordingly exercised "the authority vested in [him] by the Constitution and the laws of the United States of America," including the Defense Production Act, 50 U.S.C. App. § 2170, to address that threat. *Id*. at 60,281.

The President directed that "[t]he transaction resulting in the acquisition of the Project

Companies and their assets by [Ralls and its related entities] or Mr. Wu or Mr. Duan is hereby prohibited, and ownership by [Ralls and its related entities] or Mr. Wu or Mr. Duan of any interest in the Project Companies and their assets, whether directly or indirectly through owners, subsidiaries, or affiliates is prohibited." Presidential Order, § 2(a), 77 Fed. Reg. at 60,281. The President also directed Ralls to divest all interests in the Project Companies; "the Project Companies' assets, intellectual property, technology, personnel, and customer contracts"; and "any operations developed, held, or controlled, whether directly or indirectly, by the Project Companies at the time of, or since, their acquisition." *Id.*, § 2(b), 77 Fed. Reg. at 60,281. Ralls was directed to do so within 90 days after the date of the order, unless CFIUS extends that date for a period of not more than three months on such written conditions as CFIUS may require. *Id.* The President further subjected Ralls to additional requirements to ensure compliance with the prohibition of the transaction at issue in the Presidential Order. *Id.*, § 2(c)-(h), 77 Fed. Reg. at 60,281-60,282. The President specified that CFIUS's Interim Order and Amended Interim Order "are hereby revoked." *Id.*, § 3, 77 Fed. Reg. at 60,283.

In addition to the Oregon project that is at issue here, Ralls has also engaged in projects for the installation of Sany wind turbines in Texas and Massachusetts. (Lago Decl., ¶ 9.) Neither CFIUS nor the President has taken any action against Ralls under the Defense Production Act with respect to those projects.

III. Procedural History

After CFIUS issued its mitigation orders, but before the President acted, Ralls filed suit challenging CFIUS's exercise of its authority under 50 U.S.C. App. § 2170(*l*). (ECF 1.) Ralls initially sought a temporary restraining order and a preliminary injunction (ECF 7), but it

withdrew that request. (ECF 14.) After the President issued his Order, Ralls filed an amended complaint, raising challenges both to the Presidential Order and to the Amended Interim Order. (ECF 20.) With respect to the Presidential Order, Ralls alleges that: (1) the President exceeded his statutory authority under 50 U.S.C. App. § 2170 (Am. Compl., ¶¶ 132-143, Count III); (2) the President deprived Ralls of its property without due process of law (Am. Compl., ¶¶ 144-156, Count IV); and (3) the President denied Ralls the equal protection of the laws (Am. Compl., ¶¶ 157-167, Count V). With respect to the Amended Interim Order, Ralls alleges that: (1) CFIUS exceeded its statutory authority (Am. Compl., ¶¶ 104-119, Count I); (2) CFIUS acted arbitrarily and capriciously by not explaining the reasons that it found its order to be necessary (Am. Compl., ¶¶ 120-131, Count II); (3) CFIUS deprived Ralls of its property without due process of law (Am. Compl., ¶¶ 144-156, Count IV); and (4) CFIUS denied Ralls the equal protection of the laws (Am. Compl., ¶¶ 157-167, Count V).

Discussion

I. This Court Lacks Jurisdiction Over Ralls's Challenge to the Presidential Order

A. The Defense Production Act Explicitly Prohibits Judicial Review of Presidential Orders

The Defense Production Act could scarcely be more explicit. If the President finds that "there is credible evidence that leads [him] to believe that the foreign interest exercising control might take action that threatens to impair the national security," and that other provisions of law (apart from the International Emergency Economic Powers Act) do not, in his judgment, provide adequate authority for him to protect the national security, he is empowered to take action under the Act. 50 U.S.C. App. § 2170(d)(4). The Act defines his powers quite broadly: "the President may take *such action* for *such time* as the President *considers appropriate* to suspend

or prohibit *any* covered transaction that threatens to impair the national security of the United States." 50 U.S.C. App. § 2170(d)(1) (emphasis added). And the Act expressly precludes judicial review of the President's exercise of these powers. "The actions of the President under [paragraph (d)(1)] and the findings of the President under [paragraph (d)(4)] shall not be subject to judicial review." 50 U.S.C. App. § 2170(e). In light of this Congressional ratification of Presidential power in a field in which he holds independent authority – specifically, his power to address threats to national security that arise from foreign acquisitions of United States businesses -- the President's actions under the Defense Production Act are "'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion [rests] heavily upon any who might attack it.'" *Dames & Moore*, 453 U.S. at 668 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

Ralls cannot meet this heavy burden of persuasion, because its challenge to the Presidential Order falls squarely within the Defense Production Act's preclusion of review. It asks the Court to review the President's selection of the conditions that he considered appropriate for enforcement of the Presidential Order (Count III); the President's failure to provide Ralls with a fuller opportunity to participate in the process leading to his decision to issue the Order (Count IV); and the President's failure to explain why Ralls, and not other allegedly similarly-situated entities, was subjected to the Presidential Order (Count V). Ralls's amended complaint directly asks the Court to review the "actions" and "findings" of the President in issuing the Presidential Order. This Court, thus, need only apply the plain language of Section 2170(e) to hold that it lacks jurisdiction to review Ralls's challenge to the Presidential Order. "Here, the issue is . . . whether a clear and explicit withdrawal of jurisdiction withdraws

jurisdiction. It undoubtedly does so." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 468 (2007). *See also Al-Zahrani v. Rodriguez*, 669 F.3d 315, 318 (D.C. Cir. 2012) (applying "plain language" of statutory withdrawal of jurisdiction to preclude review of due process claim).

B. The Structure of the Defense Production Act Demonstrates that Congress Had Good Reason to Preclude Review of Presidential Orders

As noted, the Court need look no further than the plain language of 50 U.S.C. App. § 2170(e) to conclude that it lacks jurisdiction over Ralls's challenge to the Presidential Order; there is no question that Ralls seeks review of the President's "findings" and "actions" under the Defense Production Act, and that review is expressly prohibited by Section 2170(e). In addition, "the statutory scheme as a whole," *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984), provides a further demonstration of Congress's intent to prevent judicial interference with the President's exercise of his powers under the Act. *See McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conf. of the United States*, 264 F.3d 52, 60 (D.C. Cir. 2001) (reviewing legislative history to support conclusion that statutory withdrawal of jurisdiction bars review of as-applied constitutional claims); *Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991) (reviewing structure of Presidential Records Act to find intent to preclude review of claims against the President under that statute).

1. Congress's Decision to Preclude Judicial Review of a Presidential Action to Address a Foreign Transaction that Raises a Threat to National Security Is Consistent with the Scope of Presidential Authority in this Area

Congress recognized that it was legislating in an area where – even apart from an express statutory withdrawal of jurisdiction – Presidential exercises of discretion are not ordinarily subject to judicial review. Congress intentionally afforded the President a broad authority to

take action with respect to foreign acquisitions that he finds raise threats to "national security," without seeking to limit his discretion in the application of that standard. *See* H.R. Conf. Rep. No. 100-576, at 926 (1988) (noting intent that standard of "national security" be applied broadly).[4] Moreover, Congress made the deliberate decision to place the power to suspend or prohibit foreign acquisitions that threaten to impair national security directly in the hands of the President. In doing so, it recognized that this authority arose against the backdrop of the President's inherent power: "[E]xclusive of any powers derived from the Exon-Florio amendment or related regulations or executive orders, the President ultimately reserves the right in any transaction and at any time to reverse a transaction for national security purposes. This authority derives both from the International Emergency Economic Powers Act and his inherent powers in the conduct of foreign affairs." H.R. Rep. No. 110-24, pt. 1, at 12 (2007).

Congress and the President are thus in agreement that he holds broad discretion to prohibit foreign acquisitions that threaten national security, and that his exercise of that discretion is unreviewable. In issuing the Presidential Order, the President took the actions that he considered appropriate to address the threats to national security that he found had arisen from such a foreign acquisition, Ralls's acquisition of the Project Companies. *See* Presidential Order, § 1, 77 Fed. Reg. at 60,281. Ralls's challenge to the Presidential Order would require the Court to entangle itself in the President's determinations concerning foreign relations and

[4] *See also A Review of the CFIUS Process of Implementing the Exon-Florio Amendment: Hrgs. Before the S. Comm. on Banking, Housing, and Urban Affairs*, 109th Cong. 162 (2005) (statement of Robert M. Kimmitt, Deputy Secretary, U.S. Dep't of Treasury) ("Each transaction has unique characteristics and agencies are not constrained in examining all facets of a transaction that could impact national security. This is consistent with the fact that ultimately the judgment as to whether a transaction threatens national security rests within the President's discretion.").

national security. But, as the Supreme Court has long recognized:

> the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111-12 (1948). *See also Haig v. Agee*, 453 U.S. 280 (1981); *United States v. Pink*, 315 U.S. 203, 222-23 (1942); *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304 (1936); *Dakota Cent. Tel. Co. v. South Dakota ex rel. Payne*, 250 U.S. 163, 184 (1919).

The Court resolved an issue analogous to this case in *Waterman*. The case involved the Civil Aeronautics Act, which required Presidential approval of orders of the Civil Aeronautics Board granting or denying applications by foreign carriers to engage in domestic air transportation, or by domestic carriers to engage in international air transportation. The governing statute explicitly precluded judicial review by any foreign carrier of a Presidential decision under this scheme. That preclusion was not challenged in the case, and the Supreme Court held that the statute also impliedly precluded review of a challenge by a domestic carrier to a Presidential order involving an overseas air route, despite the absence of express language in the statute withdrawing that review. The Court noted that:

> [t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences.

Waterman, 333 U.S. at 111.

Likewise, here, the President exercised his authority in the fields of foreign policy and national security to issue the Presidential Order challenged in this case, and he relied on classified information in so doing. In making his finding that there is credible evidence that led him to believe that Ralls might take action that threatens to impair the national security, the President engaged in precisely the type of analysis that the Court in *Waterman* understood to be in the competence of the Executive Branch. Congress enacted Section 2170(e) in recognition that this analysis is the prerogative of the Executive, and not the judiciary. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) ("The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion.") *See also People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (finding question whether "terrorist activity of the organization threatens the security of United States nationals or the national security of the United States" to be nonjusticiable); *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (noting that the presumption in favor of judicial review "runs aground when it encounters concerns of national security").

Moreover, this case involves an attempt to seek review of the President's own decision-making in the field that has been entrusted to him both by the Constitution and by Congress. This case therefore raises precisely the concerns that led Congress to preclude review of the President's actions under the Defense Production Act. If Ralls were to succeed in this action, the President would effectively be required to re-open his determination and to issue a modified order after providing Ralls its requested opportunity to participate in Presidential

decision-making, subject to the review of this Court. But "[a] court – whether via injunctive or declaratory relief – does not sit in judgment of a President's executive decisions." *Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010) (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall. 475, 499 (1867), and *Swan*, 100 F.3d at 976 n.1). *See also Mississippi v. Johnson*, 71 U.S. (4 Wall.) at 501 ("this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties"). In light of this impossibility that injunctive or declaratory relief could run against him, at all events, the President should be dismissed from this action. And the same considerations warrant the dismissal of the action in its entirety. In enacting the preclusion of review in Section 2170(e), Congress averted the possibility that the President might be required "to exercise the 'executive Power' in a judicially prescribed fashion," *Franklin*, 505 U.S. at 826-27 (Scalia, J., concurring in the judgment), if he were subject to review for his actions under the Act. The balance that Congress chose between Presidential and judicial power should be respected here.

It is clear that Congress intended to preclude review of the President's actions to address foreign acquisitions that raise threats to national security. Judicial review would entangle the courts in the supervision of the President's actions in a field where the Executive holds broad discretion and particular competence. The plain language of Section 2170(e) thus should be applied to bar Ralls's challenge to the Presidential Order.

2. The Structure of the Act Confirms that Congress Intended to Preclude Judicial Review of Presidential Actions under the Act

In addition, the Congressional preclusion of judicial review is consistent with the structure of the Defense Production Act, which establishes Congress as the exclusive check on the President's exercise of his authority under the Act. The Act – which does not apply to all

acquisitions, but instead only to those acquisitions that could result in foreign control of a person engaged in interstate commerce, 50 U.S.C. App. § 2170(a)(3) -- contains detailed provisions that require the President and CFIUS to report to Congress on reviews and investigations of such foreign acquisitions, and that specify the timing and content of those reports. *See* 50 U.S.C. App. § 2170(b)(3)(A) (CFIUS to submit certified notice of Congress, upon completion of review that concludes action under Section 721); 50 U.S.C App. § 2170(b)(3)(B) (CFIUS to transmit certified written report on results of investigation, upon completion of investigation that concludes action under Section 721); 50 U.S.C. App. § 2170(b)(3)(C) (specifying content of reports); 50 U.S.C. App. § 2170(g) (requiring a briefing upon request to Congress on any covered transaction for which action has concluded); 50 U.S.C. App. § 2170(m) (specifying timing and content of annual reports to Congress). In contrast, the Act does not specify the content of any reporting that the President or CFIUS might make to the parties to a covered transaction. *See* 50 U.S.C. App. § 2170(b)(6) (specifying only that CFIUS shall notify parties of the "results" of the review or investigation); 50 U.S.C. App. § 2170(d)(2) (requiring only that the President "announce the decision on whether or not to take action").

Moreover, Congress expressly recognized that, by necessity, any review or investigation of national security concerns arising from a foreign acquisition would rely heavily on the use of sensitive and classified information within the Executive Branch, as well as confidential, proprietary material submitted by the parties to a transaction. *See* 50 U.S.C. App. § 2170(b)(4) (requiring Director of National Intelligence to prepare analysis of threat to national security posed by covered transactions). *See also* 50 U.S.C App. § 2170(c) (specifying confidentiality of information or documentary material filed with the President or his designee). In prohibiting

judicial review of the President's findings and actions, Congress recognized that those findings and actions would, be necessity, depend on information that is within the executive, and not the judicial, competence to evaluate. *See Waterman*, 333 U.S. at 111.

Congress recognized – in light of the obvious concerns of confidentiality would inevitably arise from a Presidential Order under the Act – that its own review would stand in the place of judicial review to serve as a check on Executive action under the Defense Production Act. In requiring reporting, Congress understood that "[s]uch reports are not intended to establish precedents under the Exon-Florio amendment since each case is unique. However, the reports will help Congress and the public develop an understanding of the policies underlying Presidential determinations, and *hold the President accountable for actions under the Exon-Florio amendment*." H.R. Conf. Rep. No. 102-966, at 731-32 (1992) (emphasis added). Thus, "permitting judicial review . . . would upset the intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns." *Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991) (holding that Presidential Records Act impliedly precludes judicial review of Presidential actions under that statute).

Moreover, Congress specified strict deadlines for review, investigation, and Presidential action under Section 721; those strict deadlines further indicate Congress's intent to preclude judicial review. As noted, CFIUS is instructed to complete a review within 30 days of accepting a notice of a covered transaction, and, if it proceeds to investigation, CFIUS must complete that investigation within an additional 45-day period. 50 U.S.C. App. § 2170(b)(1)(E), (b)(2)(C). The President is then directed to determine whether he will exercise his authority under the Defense Production Act within 15 days of the conclusion of the

investigation. 50 U.S.C. App. § 2170(d)(2). Congress acted deliberately in providing for this schedule, recognizing that a guarantee of a timely review "is important in ensuring that foreign investors are not subjected to disparate treatment relative to their domestic competitors in the vast majority of cases where the foreign investment does not pose significant national security concerns and any concerns are addressed through mitigation agreements within the 30-day period." H.R. Rep. No. 110-24, pt. 1, at 11 (2007). These "tight and rigid deadlines on administrative review and Presidential action," coupled with Congress's "nonjudicial opportunities to assess any procedural (or other) irregularities" in the President's actions, strongly support the inference – made express in the statutory text -- that Congress did not intend judicial interference in this process. *See Dalton v. Specter*, 511 U.S. at 481-482 (Souter, J., concurring). *See also Am. Soc'y of Cataract & Refractive Surgery v. Thompson*, 279 F.3d 447, 454 (7th Cir. 2002) (statutory deadline for establishing fee schedules supports inference that Congress intended to preclude review).

In sum, the plain language of Section 2170(e) precludes this Court's jurisdiction over Ralls's challenge to the President's findings and actions under the Defense Production Act. Congress's decision to preclude review is eminently sensible; given that this case involves a Presidential action against the backdrop of his inherent foreign affairs authority and in the field of national security, an area that is not traditionally a subject of judicial cognizance. Further, the structure of the Act provides further proof that Congress intended expedited action that would ultimately be subject to its own review, not that of the courts.

C. The Preclusion of Judicial Review Applies with Particular Force to Ralls's Insubstantial, As-Applied Challenges to the Presidential Order

The foregoing suffices to demonstrate that Congress meant what it said when it expressly

precluded judicial review of any challenge, such as those raised by Ralls here, to the President's findings and actions under the Defense Production Act. Accordingly, this Court need only apply 50 U.S.C. App. § 2170(e) to dismiss this action for lack of subject matter jurisdiction. Ralls's complaint, moreover, presents no reason to depart from the express statutory preclusion of review. Its challenge to the President's interpretation of the scope of his authority under the Defense Production Act is not cognizable under the APA or otherwise. Its constitutional challenges to the Presidential Order do not suffice to invoke jurisdiction, given that Congress foreclosed judicial review in order to avoid serious concerns that would arise from subjecting the President to the supervision of federal courts, and given the insubstantiality of those claims. Congress's express instruction that judicial review shall not be had of the Presidential Order, therefore, should be heeded here. *See Fischer v. Resolution Trust Corp.*, 59 F.3d 1344, 1351 (D.C. Cir. 1995) (finding preclusion of review of "insubstantial" constitutional claims against agency action).

1. Ralls Raises No Challenge to the President's Interpretation of His Authority under the Defense Production Act that Allows It to Circumvent the Jurisdictional Bar

Ralls contends that the President exceeded his statutory authority by specifying certain conditions on Ralls's use of the Project Companies, rather than solely ordering the divestiture of those companies. Because Ralls directly challenges the President's own actions, it could not (even in the absence of the express withdrawal of review in Section 2170(e)) raise its challenge to the Presidential Order under the Administrative Procedure Act (APA), because the President is not an agency subject to the APA's terms. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); *Dalton v. Specter*, 511 U.S. 462, 473-74 (1994); *Swan v. Clinton*, 100 F.3d 973, 981 n.4

(D.C. Cir. 1996). Nor could Ralls pursue a challenge against the Presidential Order outside of the scope of the APA on the theory that the dispute over the scope of the President's interpretation of his statutory authority rises to the level of a constitutional challenge. Although the Court recognized in *Franklin* that some constitutional claims may proceed outside of the APA as to Presidential actions, "if every claim alleging that the President exceeded his statutory authority were considered a constitutional claim, the exception identified in *Franklin* would be broadened beyond recognition." *Dalton v. Specter*, 511 U.S. at 474 (declining to permit "evisceration" of preclusion of statutory claims against the President by characterizing such claims as constitutionally based). Ralls presents exactly the sort of challenge that the Court rejected in *Specter*; its claim that the President misinterpreted his authority under Section 2170(d) would not be judicially cognizable, even in the absence of an express statutory withdrawal of judicial review. In enacting Section 2170(e), Congress underscored the rule of *Specter* that the President's interpretation of the scope of this authority under a statutory grant of authority to him will not be subject to judicial second-guessing.

The only potential means for Ralls to assert that the President exceeded his statutory authority would be a non-statutory cause of action under the authority of *Leedom v. Kyne*, 358 U.S. 184 (1958); such a claim, if it were available, could be brought only against a subordinate official charged with carrying out the President's instructions, not against the President himself. By enacting Section 2170(e), however, Congress clarified that Presidential actions under the Defense Production Act are not subject even to this circumscribed form of non-statutory review. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (noting Congressional

power to preclude non-statutory judicial review of Presidential action).[5]

The *Kyne* exception applies only where three conditions are met: "(i) the statutory preclusion of review is implied rather than express; (ii) there is no alternative procedure for review of the statutory claim; and (iii) the agency plainly acts 'in excess of its delegated powers and contrary to a specific prohibition in the' statute that is 'clear and mandatory.'" *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (quoting *Kyne*, 358 U.S. at 188) (internal citations omitted). Neither the first nor the third condition is satisfied here. In enacting 50 U.S.C. App. 2170(e), Congress has explicitly precluded review of the President's actions. And the third condition requires that the government's error be "so extreme that one may view it as jurisdictional or nearly so." *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988).

Ralls's claim falls far short of that standard. The Act authorizes the President to "take *such action* for *such time* as the President *considers appropriate* to suspend or prohibit any covered transaction that threatens to impair the national security of the United States." 50

[5] This case is accordingly unlike other cases in which a challenge to the implementation of a Presidential order has been allowed to proceed. In *Chamber of Commerce*, the Executive Order at issue was not self-executing, and further action by the Department of Labor was required to determine the parties' obligations; the court of appeals permitted a challenge to proceed against the Department of Labor. The court recognized that *Dalton v. Specter* would dictate a different result in a case that involved a direct challenge to the President's exercise of the discretion afforded to him in a statute, given "the special status of the President," *Chamber of Commerce*, 74 F.3d at 1331 n.4, particularly in a case in which the President exercised his power to protect that national security, *id.* at 1332 n.5. *Swan* involved an allegation that the President had violated a purely ministerial duty, and the court of appeals addressed whether subordinate officials could be directed not to comply with the President's alleged violation of that ministerial duty. *Swan*, 100 F.3d at 980. This case, by contrast, involves the President's personal exercise of discretion that has been conferred to him by Congress, in the field of national security. Moreover, unlike *Chamber of Commerce* or *Swan*, this case involves Congress's explicit preclusion of judicial review of the President's exercise of that discretion. Judicial review is therefore unavailable.

U.S.C. App. § 2170(d)(1). The provision affords the President a broad range of authority, and certainly permits him to take action that he considers to be appropriate to ensure the effective implementation of his order that prohibits a foreign acquisition on national security grounds. Ralls faults Congress for not describing with more specificity the scope of Presidential power to ensure the successful implementation of such an order. But "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore*, 453 U.S. at 678 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981) (ellipses in original)).

2. Ralls Raises No Substantial Constitutional Challenge to the President's Exercise of His Discretion under the Defense Production Act

Second, Ralls raises constitutional challenges to the manner in which the President exercised his discretion under the Defense Production Act. Those challenges amount to nothing more than disguised challenges to the President's exercise of his statutory discretion under the Act; they do not, therefore, justify departing from Congress's preclusion of judicial review. To be sure, in some circumstances, courts will apply a presumption that Congress does not intend a statutory withdrawal of jurisdiction to preclude review of all constitutional claims that could arise in response to particular agency action. *See Johnson v. Robison*, 415 U.S. 361, 373-74 (1974). This presumption is invoked to avoid the constitutional concerns that assertedly would arise if all such claims were precluded. That presumption does not apply here. As noted, this case concerns the President's action in the area of national security exercising power expressly afforded to him by Congress. In light of the Congressional and Presidential agreement that the

President's exercise of his discretion under the Defense Production Act should not be subject to review, and in light of the fact that judicial review would require the Court to superintend the President's exercise of that discretion, serious separation-of-powers concerns would arise if this Court were permitted to supervise the President's exercise of his authority under Section 721. Accordingly, there is no reason to doubt that Congress meant what it said in withdrawing all review of the President's actions under the Defense Production Act.[6]

The presumption is also inapplicable because the constitutional claims that Ralls raises are insubstantial. Ralls asserts that the President deprived it of property without due process because he did not provide Ralls with a fuller opportunity to participate in the process of Presidential decision-making that led to the Presidential Order. But Ralls had no property interest in completing its acquisition of the Project Companies free from CFIUS oversight. In order to hold a property interest, a person "must have more than a unilateral expectation of" a benefit; "[h]e must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Ralls, like any other foreign acquirer of a United States entity in a transaction that implicates national security, had no legitimate claim of entitlement to complete its acquisition without CFIUS approval. As noted, the Defense Production Act contemplates that parties will voluntarily file a notice of their intended transaction with CFIUS before completing the transaction, and a party that does not do so takes

[6] Notably, Ralls raises only as-applied challenges to the Presidential Order that is at issue here. Section 2170(e) would not preclude review of a facial challenge to the Defense Production Act (although the grounds, on the merits, for any such facial challenge are not apparent), as the statute precludes review only of the President's "findings" and "actions," not of the overall statutory scheme. *See General Elec. Co. v. EPA*, 360 F.3d 188, 192 (D.C. Cir. 2004) (interpreting statutory bar on review not to apply to facial challenge). This case thus does not present the sort of concerns that motivated the Court in *Johnson v. Robison* to interpret a jurisdictional provision not to withdraw all review of a statutory scheme.

the risk that its transaction will be unwound. For that reason, no well-advised purchaser would proceed with a transaction that raises potential national security concerns without first seeking CFIUS clearance. *See Review of the CFIUS Process* at 114 (statement of Deputy Secretary Kimmitt). Because Ralls chose to ignore these considerations and to proceed with its acquisition, "the consequences of [its] conduct were entirely foreseeable." *Paradissiotis v. United States*, 304 F.3d 1271, 1276 (Fed. Cir. 2002); *see also Dames & Moore*, 453 U.S. at 674 n.6 (given President's authority to revoke attachments on foreign assets under the IEEPA, party "did not acquire any 'property' interests in its attachments").

Moreover, the President and CFIUS followed the procedures prescribed by 50 U.S.C. App. § 2170 by inviting Ralls to submit its notice of the covered transaction. (Lago Decl., ¶ 5.) Ralls submitted that notice, which included its detailed argument as to why it believed that its transaction did not present a threat to national security, and why it believed that any possible national security threat could be addressed by provisions of law other than the Defense Production Act. (ECF 7-7.) Due process did not require the President to give Ralls further opportunities to participate in his decision-making. *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (due process does not prevent decision based on classified information to which party did not have access). *See also Haig v. Agee*, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling than the security of the Nation.").

Ralls also asserts that the President denied it the equal protection of the laws by not explaining why allegedly similarly-situated persons have not also been subject to a Presidential Order under the Defense Production Act. This is merely an attempt to restate an APA rational

decision-making claim in constitutional terms. Section 2170(e) prohibits any inquiry into the President's findings and actions, and the mere re-assertion of that inquiry as a rational-basis equal protection claim does not change that result. *See, e.g.*, *Manani v. Filip*, 552 F.3d 894, 900 n.3 (8th Cir. 2009) ("[A] petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking an abuse of discretion argument in constitutional garb."). In any event, Ralls' equal protection claim obviously lacks merit. Its mere speculation that the President should also have issued an order addressing other windfarm projects in the area that have foreign-made equipment does not suffice to carry its "heavy burden" to negate "every conceivable basis which might support" the Presidential Order. *Tate v. District of Columbia*, 627 F.3d 904, 910 (D.C. Cir. 2010) (internal quotations omitted).

Ralls presents no substantial challenge to the Presidential Order. Thus – even if Section 2170(e) contained an exception allowing review of meritorious challenges to such orders – there is no reason to depart from the plain language of the statutory withdrawal of jurisdiction. This Court lacks jurisdiction over Ralls's claim with respect to the Presidential Order.

II. Ralls's Challenge to the Amended Interim Order Is Moot

Article III of the Constitution limits federal court jurisdiction to "'actual, ongoing controversies.'" *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 78 (D.C. Cir. 2011) (quoting *Honig v. Doe*, 484 U.S. 305, 317 (1988)). "[A] federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (internal quotation marks omitted). In other words, "Article III denies federal courts the power to decide questions that cannot affect

the rights of litigants in the case before them, and confines them to resolving real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Lewis v. Cont'l Bank Corp*., 494 U.S. 472, 477 (1990) (internal quotation omitted).

Under these principles, Ralls's challenge to the mitigation order is moot, and this Court may not exercise jurisdiction over the challenge. When he issued his Presidential Order, the President specified that "CFIUS's Order Establishing Interim Mitigation Measures of July 25, 2012, and Amended Order Establishing Interim Mitigation Measures of August 2, 2012, are hereby revoked." Presidential Order, § 3, 77 Fed. Reg. at 60,283. The Amended Interim Order no longer imposes any obligations on Ralls; those obligations are now defined instead by the Presidential Order. Because the Court "can neither invalidate, nor require the [agency] to adhere to" an agency decision that has "disappeared into the regulatory netherworld," *Roosevelt*, 661 F.3d at 79 (internal quotation marks omitted), the Court "can offer no relief which can redress [Ralls's] asserted grievance," *City of Houston v. Dep't of Hous. & Urban Dev*., 24 F.3d 1421, 1426 (D.C. Cir. 1994) (internal quotation marks omitted), and Ralls's challenge to the Amended Interim Order no longer presents a live controversy.

Ralls seeks to revive its challenge to the Amended Interim Order by invoking an exception to the mootness rule. (*E.g.*, Am. Compl., ¶ 117.) This exception "applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *FEC v. Wis. Right to Life, Inc*., 551 U.S. 449, 462 (2007) (internal quotation marks omitted). This doctrine "applies only in exceptional situations."

City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983). Ralls bears the burden to show that this case presents such an exceptional situation. *See Honeywell Int'l, Inc. v. NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010).

Ralls cannot meet this burden. "An action is capable of repetition only if there is a reasonable expectation that the same complaining party would be subjected to the same action again. The same action generally refers to particular agency policies, regulations, guidelines, or recurrent identical agency actions." *Roosevelt*, 661 F.3d at 79 (internal quotations omitted). Ralls cannot show that CFIUS would subject it to an "identical agency action"; it should be apparent that CFIUS issued the Amended Interim Order in response to the particular concerns that arose in the Committee's review of the particular transaction giving rise to this case. Indeed, Ralls has completed other windfarm projects that have not caused CFIUS to issue mitigation orders. (Lago Decl., ¶9.) Because Ralls cannot show that it will be subjected to the same alleged legal wrong, it cannot prove that an exception to mootness doctrine applies. *See Armstrong v. FAA*, 515 F.3d 1294, 1296 (D.C. Cir. 2008); *see also Munsell v. Dep't of Agric.*, 509 F.3d 572, 583 (D.C. Cir. 2007) ("speculation . . . without more, does not shield the case from a mootness determination") (internal quotation marks omitted).

Conclusion

For the foregoing reasons, the United States respectfully requests that the Court dismiss this action for lack of subject matter jurisdiction.

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